



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Browning-Ferris Industries of Hawaii, Inc.--Costs

File: B-278051.2

Date: April 27, 1998

Kenneth D. Brody, Esq., McMahon, David & Brody, for the protester.
Marian E. Sullivan, Esq., Department of the Air Force, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office recommends that protester be reimbursed the costs of filing and pursuing its protest where agency unduly delayed taking corrective action in the face of a clearly meritorious protest; protest is clearly meritorious when a reasonable agency inquiry into the protester's allegations would have revealed that estimates in the solicitation had no reasonable basis.

DECISION

Browning-Ferris Industries of Hawaii, Inc. (BFI) requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the terms of request for proposals (RFP) No. F64605-97-R-0017, issued by the Department of the Air Force for waste disposal services at Hickam Air Force Base in Hawaii.

We grant the request.

The agency issued the solicitation on July 16, 1997, for a fixed-price contract for collection, transportation, and disposal of waste from industrial/medical (IND/MED) facilities and military family housing (MFH) at Hickam for a 1-year base period, with four 1-year option periods. The solicitation provided for a selection decision based on price and technical factors, with technical factors "significantly more important" than price.

The RFP provided a schedule for pickups from the MFH areas and provided for the contractor to submit a frequency schedule for pickup of IND/MED refuse. RFP at 50-51. In addition, page 53 of the RFP contained an "Unscheduled and/or Special Events" provision, advising offerors of a requirement to make certain unscheduled collections, upon notification from the agency's quality assurance evaluator. Services would include relocation and return of containers to and from "special events areas," supply and removal of additional containers, and the collection and disposal of contents. Id. The solicitation did not provide a list of "special events";

it contained estimates of total work load, based on historical records, but no breakdown showing how much of the total the regular pickups generated, as opposed to the proportion generated during unscheduled or special events. See RFP at 54.

The RFP contained two contract line item numbers (CLIN) for unscheduled/special event services, CLIN 0006, with seven sub-CLINs (0006AA-0006AG), for the IND/MED areas, and CLIN 0016, with three sub-CLINs (0016AA-0016AC), for the MFH areas.¹ These CLINs contained estimated quantities for various sizes of containers.²

The solicitation required submission of offers by August 1. The agency issued two amendments to the solicitation; the first, responding to questions from potential offerors, was issued on July 25, on which date the agency also conducted a site visit. The record contains no evidence that any offeror questioned the requirement for "special events" or the estimates for CLINs 0006 and 0016, or objected to the August 1 date for submission of proposals prior to that date.

On that date, five firms submitted offers under the RFP; the incumbent contractor, Technology Services International, Inc. (TSI), submitted the lowest price, with BFI's price second high. In her selection decision, the contracting officer essentially concluded that BFI's proposal was technically equivalent to a third offeror's proposal, which was lower priced; she concluded, however, that the third offeror's higher rating relative to TSI's rating did not present an advantage justifying the payment of a premium over TSI's low price. She therefore selected TSI for award, and BFI filed a protest with our Office.

BFI first contended that the agency had selected the lowest-priced, acceptable offer, contrary to the terms of the RFP, which provided for a price/technical tradeoff. Protest at 1, 6-7. BFI also challenged the agency's evaluation of its proposal. Id. at 1-2, 7-8. In addition, BFI contended that TSI, as the incumbent, had special knowledge of the government's requirements, in particular those under CLINs 0006 and 0016, which TSI had offered to perform at "no cost." Id. at 2, 8-9. As part of its argument that TSI had an unfair competitive advantage, BFI also complained that the short, 16-day period between the issuance of the RFP and the date set for receipt of initial offers deprived offerors other than TSI of the opportunity to gather enough information to be competitive. Id. at 9.

¹The RFP also contained "special event" CLINS for the option years.

²For example, CLINs 0006AA-0006AD, for collection and disposal from the IND/MED areas of 4-, 6-, 8-, and 40-cubic yard containers, contained estimates of 52, 52, 200, and 200 containers each, respectively.

On September 17, 5 days after the protest was filed, the agency filed a request for partial dismissal of this last ground of protest as untimely, based on BFI's failure to object to the schedule for submitting proposals, or to any unfair competitive advantage by the awardee, prior to the August 1 due date. See 4 C.F.R. § 21.2(a)(1) (1997) (protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals shall be filed prior to that time). In response, BFI asserted that, until it learned of TSI's "no cost" offer for CLINs 0006 AND 0016, it had no reason to suspect that the estimates for unscheduled/special events were inaccurate. BFI letter dated September 22, 1997 at 2. Therefore, BFI argued, its ground for protest was not apparent from the face of the RFP and in fact did not arise until after it had been allowed to review TSI's price. Our Office denied the agency's request for dismissal.

The agency subsequently advised our Office that it had decided to reevaluate proposals, conduct discussions as necessary, and make a new selection decision based on the reevaluation. Air Force letter dated September 26, 1997. The Air Force requested that our Office dismiss BFI's protest as academic. See East West Research, Inc.-Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379 at 1-2; Steel Circle Bldg. Co., B-233055, B-233056, Feb. 10, 1989, 89-1 CPD ¶ 139 at 2 n.1 (our Office will not consider academic questions, such as where the agency has taken the requested corrective action). BFI's response indicated that its concerns over the estimates for unscheduled/special events remained unresolved. BFI letter dated October 1, 1997. Although we dismissed as academic those portions of the protest pertaining to BFI's challenge to the evaluation and selection decision, we denied the agency's request to dismiss the protest in its entirety.

On October 16, the agency filed a third "renewed" request for summary dismissal, providing its first substantive response to BFI's challenge to the estimates in CLINs 0006 and 0016. The agency stated that Hickam personnel had estimated approximately one special event per week and had developed the specific container estimates for the CLIN 0006 and 0016 sub-CLINs on the basis of how many of each kind of container these special events would involve. With regard to how the number of special events was calculated, the agency stated only that it had used its "best estimate and technical expertise," without further explanation. Contracting officer's statement dated October 15, 1997. The agency stated that it had no further information regarding its requirements apart from the estimates provided in the RFP, but contended that any challenge to the validity of the estimates or the methodology for generating them would be untimely. See 4 C.F.R. § 21.2(a)(1). The protester responded, defending the timeliness of its challenge to the agency's estimates and raising a series of specific questions regarding the basis for the agency's estimates.

We again denied the agency's request to dismiss the protest and asked the Air Force to provide specific information on how many unscheduled/special events had been held under the prior contract, with a list of those events, as well as an explanation

of any discrepancy between its prior experience and the current estimates. After several attempts to locate and question the individuals at Hickam who had prepared the estimates, the Air Force concluded that it lacked historical data to support the estimates and advised our Office of its decision to revise the solicitation by eliminating CLINs 0006 and 0016. By decision of December 10, we dismissed BFI's protest as academic in light of the agency's planned corrective action. In that decision, we also denied an October 7 request for costs from the protester, which was based on the Air Force's earlier decision to take corrective action responsive to the two other issues in the protest regarding the evaluation and selection decision. Also on December 10, BFI filed this request for reimbursement of its protest costs based on the agency's decision to take corrective action in response to its third ground of protest, regarding the estimates for the unscheduled/special events services.

Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e). As a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been "clearly meritorious," i.e., not a close question. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ __ at 3. A protest is "clearly meritorious" when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position. Id. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. David Weisberg--Entitlement to Costs, 71 Comp. Gen. 498, 501 (1992), 92-2 CPD ¶ 91 at 4.

In opposing BFI's request, the Air Force asserts that it was our Office, not BFI, that raised questions regarding the accuracy of the Air Force's estimates for unscheduled/special events, and thus that the decision to take corrective action was not made in response to a meritorious protest. Second, the Air Force essentially argues that our Office has already denied BFI's request for costs, in our December 10 decision, and that the protester provides no basis for reconsideration of that decision. See 4 C.F.R. § 21.14(a) (to be considered, request for reconsideration must specify an error of law or information not previously considered in the initial decision).

The record here does not support the Air Force's arguments. BFI's initial protest and its response to the Air Force's initial requests for dismissal were specifically based on BFI's assertion that TSI must have had information not provided to the other offerors regarding the agency's actual requirements for CLINs 0006 and 0016, for unscheduled/special events. By letter dated October 1, the protester suggested a method of calculating better estimates for CLINs 0006 and 0016--the use of "weight

tickets" generated during unscheduled/special events.³ The agency's October 16 request for dismissal specifically responded to the protester's concerns about the accuracy of the estimates, explaining the agency's methodology for producing the estimates; in that letter, the agency recognized the weakness of those estimates, essentially defending its position on the ground that BFI's challenge was untimely filed after the receipt of initial proposals. Nor does the agency deny that its decision to take corrective action came in response to the query from our Office which, rather than raising a new issue, reiterated the concern about the estimates which had been raised by BFI. The record therefore clearly demonstrates that the protester directed the agency's attention to the precise flaw that later led to the agency's corrective action. Holiday Inn-Laurel--Protest and Request for Costs, B-270860.3, B-270860.4, May 30, 1996, 96-1 CPD ¶ 259 at 4, recon. denied, B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 (protest costs may be recovered where corrective action was taken in response to queries from our Office bearing directly on issues raised in the protest).

Further, it is clear that here there are circumstances not considered in our initial decision, denying BFI's request for costs. That decision was clearly limited to BFI's initial request, which was based on the Air Force's initial September 26 corrective action, taken 2 weeks after the protest was filed in response to BFI's challenge to the evaluation and selection decision. Since the Air Force had taken corrective action promptly in response to those two issues, there was no basis to recommend that BFI recover its protest costs at that time. See CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 1-2. At the time of our initial decision, neither party had addressed the circumstances surrounding the Air Force's December 1 decision to take further corrective action in response to the remaining issue in the protest, the challenge to the unscheduled/special events estimates in the RFP; BFI did not, in fact, make its request for costs until the day of our decision dismissing the protest on the basis of the agency's decision to cancel CLINs 0006 and 0016. These circumstances make it appropriate to consider BFI's December 10 request separately from its initial request for costs.

Although arguing that BFI did not raise the issue, the agency does not deny that there was merit to the contention that the solicitation estimates were inaccurate; given the agency's admission that there were no historical records to support the estimates in the solicitation, we find that BFI's protest was clearly meritorious. See, e.g., Beldon Roofing & Remodeling Co., B-277651, Nov. 7, 1997, 97-2 CPD ¶ 131 (sustaining protest where the agency was unable to establish that quantity estimates

³It was the position of the agency, and later of the intervenor, that the unscheduled pickups would merely be additional stops on the regularly scheduled routes, so that the weight tickets--showing the amount of waste collected during the day--would shed no light on the proportion of refuse generated by unscheduled, as opposed to scheduled, pickups.

reflected anticipated requirements). The record here shows that the agency filed three requests for dismissal, two of them after we had already informed the Air Force that we were treating BFI's challenge to the estimates as timely. Despite the acknowledged validity of the protester's questions and the agency's own professed concerns about the estimates, the agency made no reasonable factual investigation of the basis for the estimates for more than 2 months after the filing of the protest. That investigation occurred only in response to our questions, which essentially repeated those asked by the protester in its response to the agency's third motion to dismiss. This delay frustrated the intent of the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3554(a)(1) (West Supp. 1997), by impeding the economic and expeditious resolution of the protest.⁴ Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5-6.

We recommend that BFI be reimbursed its protest costs which relate to the issue of the unscheduled/special events services estimates in the RFP.⁵ BFI should submit its certified claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

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⁴Our conclusion here does not change our view that an agency, in defending protests, is permitted to vigorously assert procedural and substantive defenses in good faith without having to risk the assessment of costs. Carlson Wagonlit Travel--Entitlement to Costs, B-266337.3 et al., July 3, 1996, 96-2 CPD ¶ 99 at 4. An agency's pursuit of a reasonable procedural litigation strategy before our office does not constitute undue delay. Id.

⁵Since the corrective action at issue here was taken solely in response to this ground of protest--which is entirely severable from the two issues which prompted the earlier corrective action and for which we found that BFI may not recover its costs--our recommendation that BFI recover its costs is limited to the estimates issue. See Holiday Inn-Laurel--Protest and Request for Costs, supra, at 3 n.2.